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The Credit Allowable against the Basic Federal Estate Tax for Death Taxes Paid to State Statutes Enacted to Take Advantage Thereof-Constitutional Difficulty and Some Suggested Solutions

Max Oliver Cogburn

THE CREDIT ALLOWABLE AGAINST THE BASIC FEDERAL ESTATE TAX FOR DEATH TAXES PAID TO STATE STATUTES ENACTED TO TAKE ADVANTAGE THEREOF— CONSTITUTIONAL DIFFICULTY AND SOME SUGGESTED SOLUTIONS*

MAX OLIVER COGBURN†

Introduction

In the early 1920's the dread of a death tax loomed large in the minds of those who had amassed considerable wealth. By 1924 there was a great deal of pressure for the repeal of all Federal estate taxes. Andrew Mellon, Secretary of the Treasury, advocated such a course, as did numerous State governors and other persons who appeared before the Committee of Ways and Means of the House of Representatives of the United States.[1]

Meanwhile, certain States were capitalizing upon this fear by advertising that they had no death tax, this being done to induce wealthy persons to move within their borders.[2] Many people were fearful that there would be a mass exodus of persons from their home State to these "favored States." As a result there was a desire among Congressmen to do something to ameliorate this situation. At the same time, there was a clamor for the Federal Government to abandon the field of death taxation to the States.[3]

It was in the spirit of correcting this situation that the credit against

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† A.B., LL.B., University of North Carolina; LL.M. Harvard Law School. Assistant Director, Institute of Government and Assistant Research Professor of Public Law and Government, University of North Carolina.

[1] See *Hearings before Committee of Ways and Means of the United States House of Representatives, relative to the Revenue Act of 1924*, p. 1 *et seq.*

[2] Perkins, *State Action under the Federal Estate Tax Clause*, 13 N. C. L. REV. 271 (1935).

[3] See *Hearings before Committee on Ways and Means of the U. S. House of Representatives on the Revenue Act of 1924*, pp. 47-64, where Edgar Brown, Speaker of the S. C. House of Representatives argued that the Federal Government should leave death taxation to the States, as a matter of States' Rights. He said (at p. 53): ". . . as a matter of principle and as a matter of democracy, the Federal Government has no right in the inheritance tax field. It is a field which the State ought to have to itself. Fundamentally it is a tax upon the right to inherit. That is the theory upon which the courts have held that it is legally justified. That being true, it is the State which gives its citizens the right to inherit and protects them in that inheritance and the State is the only authority which can morally and legally exact a death tax."

the Federal Estate Tax was born.[4] The wave of opinion following the suggestion of the credit was something of a boomerang to its proponents. Instead of satisfying those who had asked for the complete removal of the Federal Government from the death tax field, the idea of allowing the crediting against the basic Federal Estate Tax of a part of death taxes paid to the States furnished them additional ammunition. The credit was further labeled as a coercive device to compel States to enact death taxes.[5] There was, however, sentiment voiced in behalf of the credit, some of which was grounded upon the economic inequity of allowing States to impose death tax.[6]

It is clear that one of the reasons for the enactment of the credit was to induce States to enact laws imposing death taxes. In *Florida v. Mellon*,[7] Florida sought to attack the validity of the credit by seeking leave to file a bill of complaint in the Supreme Court of the United States to enjoin the Secretary of the Treasury and the Collector of Internal Revenue from attempting to collect Federal death taxes in

[4] The credit provision came into the law by way of §301 (b) of the Revenue Act of 1924. At that time the credit was up to 25% of the Federal Estate Tax. Section 301 (b) of the Revenue Act of 1926 increased this to 80%. In its present form, a credit of up to 80% is allowed. I. R. C. §813 (b).

[5] Judge Scott, from Altacosa County, Texas, advanced this argument before the House Committee of Ways and Means when that Committee was considering the revision of the Revenue Act of 1924. The Chairman countered with this (*Hearings before Committee of Ways and Means of the House of Representatives of the U. S.*, in regard to the Revision of the Revenue Act of 1924, p. 303); "Would not the practical effects . . . of the repeal of the Federal inheritance tax be to enable States like Florida to coerce other States into levying merely a nominal tax to prevent their wealthy residents from taking up a nominal residence in Florida for the purpose of evading the tax?" Hence, there was some feeling among the Congressmen that failure to act in relieving the interstate death tax competition would be coercion of those States which had death taxes just as much as enactment of the credit would amount to coercion of the minority of States which had no such taxes.

[6] 68 CONG. REC. 3112 (1924):

Mr. Griffin: ". . . I think it is essentially the function of the Federal Government to take control of the regulation and taxation of the transfer of estates for the very reason [of] the great diversity among the States in the amount of taxes imposed. Some of the States have no inheritance or estate taxes, while others have various rates. . . . The consequence of that is that there is a shifting about by men of wealth of their places of residence in order to evade taxation. New York is a great center of wealth—wealth that is brought there and into the pockets of a few men from all over the country—from coal and many other industries. But usually these men only have their official residences in the city of New York. When they want to die they go to Connecticut or Rhode Island, Florida or the District of Columbia. They may have their mansions on Fifth Avenue, but the place where they die, if they can help it, is some State or place where no inheritance law can haunt them."

* * *

Mr. Green of Iowa: "For that reason—the reason which the gentlemen has just stated—a State inheritance tax will always prove more or less of a failure . . . ; and the only proper way, it seems to me, would be to provide—and I understand there will be an amendment offered to that effect—that the amount of the State inheritance tax shall be credited upon this tax, not to exceed 25%, and in that way the States will be better off than they are now."

[7] 273 U. S. 12 (1927).

Florida. Leave to file the bill of complaint was denied on two grounds: (1) Florida was not directly injured by the imposition of the tax because even if it caused withdrawal of property from Florida, that State could get the necessary tax by raising the rates on remaining property. (2) Florida could not maintain the suit as *parens patriae* of its citizens because where the United States is involved, it, and not a State, is *parens patriae* of the citizens of the State.

Thus, we see that there were two main purposes which led to the enactment of the credit provision: One was that of ending the existent death tax competition among the States.[8] The other was to end the clamor for the abolition of Federal death taxation. Fear of multiple State taxation was not an actuating factor. It was the dread that certain States would impose no death taxes, rather than that such taxes if imposed might be so applied as to fall inequitably upon an estate, that was uppermost in the minds of the Congressmen. Whether the constitutional difficulty, considered herein, which has been fostered by State legislative action taken to implement the credit, could have been avoided by the adoption by Congress of some other plan to achieve the desired ends, is a matter considered later in this paper. We shall first consider the pertinent Federal constitutional background existing at the times when the credit device and the resulting State statutes came into being.

The Federal Constitutional Background

The concrete application of State statutes enacted to give complete effect to the Federal Estate Tax Credit has given rise to a Federal constitutional problem. The constitutional major premise which raises the difficulty may be stated as follows: For a State to tax tangible property located beyond its jurisdiction amounts to a deprivation of property without due process of law and is, therefore, a violation of the Due Process clause of the Fourteenth Amendment to the Constitution of the United States.[9] Application of the rule to a concrete case must be preceded by a two-pronged inquiry: Firstly, When is tangible property located beyond a State's jurisdiction? Secondly, What constitutes taxation by a State of such property?

1. Tangible property is beyond a State's jurisdiction to tax when it has acquired a *situs* in another State.[10] While the *single tax situs* is now the rule as to tangible property,[11] the present rule as to the taxa-

[8] See note 5 *supra*.
[9] Curry v. McCanless, 307 U. S. 357, 363 (1939); Frick v. Pennsylvania, 268 U. S. 473 (1924); Green v. Van Buskirk, 7 Wall. 139, 150 (U. S. 1869).
[10] The concept of *situs* has been labeled a "spurious conception" in the law of taxation. Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation*, 47 HARV. L. REV. 628, 640 (1934). Professor Lowndes takes the position that *situs* is merely a convenient tool which the courts employ to prevent multiple State taxation.
[11] Frick v. Pennsylvania, 268 U. S. 473 (1924). Northwest Airlines v. Minne-

tion of intangible property is that such property may be taxed by more than one State.[12] Thus, as it is not a violation of the fundamental law of the United States for more than one State to tax the same intangible property belonging to the same taxpayer, little complaint of unconstitutionality can be raised against a State death tax statute which is upon property both within and without the State, so long as the out-of-State property to which it is applied is intangible property. Such complaint becomes clearly audible when, under such circumstances, the out-of-State property is tangible in character.

2. Once it is determined that some of the tangible property of the estate has acquired a taxable situs in some State other than the taxing State, a further step must be taken before it may be observed whether the death tax imposed transcends the limits of due process of law. That is, it must be determined whether the tax statute in question *taxes* the extra-State tangible property, within the meaning of the Constitutional prohibition. This inquiry brings one to grips with what is perhaps one of the most thoroughly fictitious notions in the field of taxation: namely, that a tax upon the transmission of property at death is not a tax upon the property transmitted but is a tax upon the right of transmission, *measured by* the value of the property so transmitted.[13] The leading case is that of *Maxwell v. Bugbee*,[14] involving a New Jersey inheritance tax which was limited in terms to the taxation of that property of a nonresident decedent which was located in New Jersey. The tax was, however, computed in this way: The *rate* of the tax (the rate being progressively higher as the value of the decedent's estate increased) was based upon the total value of the decedent's property, wherever located, and the rate so obtained was applied to that part of the decedent's property which was located in New Jersey. It was objected that this method of computing the tax was a deprivation of property without due process of law "because it *in effect* taxes property

sota, 322 U. S. 292 (1944) applied this rule with a vengeance. In that case a Minnesota personal property tax upon all the airplanes of Northwest Airlines, a Minnesota corporation, was involved. The validity of the tax was sustained, although the airplanes were outside Minnesota during a part of the taxable year.

[12] Central Hanover Bank and Trust Co. v. Kelly, 319 U. S. 94 (1942); State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942). This situation is somewhat ameliorated by the existence in forty-five states, the District of Columbia, and Hawaii of statutes which grant exemption to intangibles. These statutes are roughly of three types: (1) Those which exempt all intangibles unconditionally. (2) Those which exempt the intangibles of nonresidents unconditionally. (3) Those which exempt the intangibles of nonresidents on a reciprocal basis. *See* 1 CCH ALL-STATE INH., ESTATE AND GIFT TAX REPORTER, Compendium.

[13] Such a notion is economically pure nonsense. Consider, *e.g.*, a tax upon the *right*, to operate a farm, *measured* by the value of the *farm*. Clearly, the tax is upon the farm. That is where the tax ultimately falls. For example, if the tax were not paid, would not the farm be sold to enable the taxing authority to realize the tax? When the ultimate incidence of a tax is upon property, it flies in the face of common understanding to say that the tax is not *upon* the property.

[14] 250 U. S. 525 (1919).

beyond the jurisdiction of the State."[15] The United States Supreme Court upheld the statute on the ground that the tax was a privilege tax within the authority of New Jersey to levy and that when a State levies taxes within its authority, property which is not taxable by that State may be used as a *measure* of the tax imposed. To bolster the decision which it had reached, the Court resorted to "weasel words" which added nothing to the comprehensibility of the decision.[16] Mr. Justice Holmes entered a dissent in which he made it clear that he felt that the line which the Court had drawn would not be effective to prevent taxation by States of property over which they had no taxing jurisdiction. He said: "Many things that a legislature may do if it does them with no ulterior purpose, it cannot do as a means to reach what is beyond its constitutional power. . . . It seems to me that when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed *in effect,* no matter what form of words may be used."[17]

Five years later, the Supreme Court was called upon to decide *Frick v. Pennsylvania.*[18] That case involved a Pennsylvania statute which provided that where a decedent was domiciled in Pennsylvania at the time of his death, a tax should be imposed upon the passage at his death of all of his property, real or personal, wherever located. The particular decedent involved died domiciled in Pennsylvania, leaving tangible property in Pennsylvania and tangible personalty in New York and Massachusetts. The Supreme Court struck down the statute on the ground that it was operative to deprive the taxpayer of property without due process of law, since it sought to tax tangible personalty having an actual situs outside of Pennsylvania.[19] *Maxwell v. Bugbee*[20] was dis-

[15] *Id.* at 539. (Emphasis supplied.)

[16] *Ibid.* The Court said: "In the present case the State imposes a privilege tax clearly within its authority and has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not *really* make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. . . . It [the tax] is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the State exceeds its authority in imposing a tax upon a subject-matter within its jurisdiction in such a way as to *really* amount to taxing that which is beyond its authority, that such exercise of power by the State is held void." (Emphasis supplied.) *Query:* When is a tax *really* a tax upon property beyond a State's jurisdiction?

[17] *Id.* at 543, 544. (Emphasis supplied.) White, C. J., and Justices Van Devanter and McReynolds concurred in this dissent.

[18] 268 U. S. 473 (1924).

[19] Van Devanter, J., wrote for a unanimous Court: "One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had the power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it

tinguished by the use of the following language: "The only bearing which the property without the State had [in *Maxwell v. Bugbee*] on the tax imposed in respect of the property within was that it affected the rate of the tax. Thus, if the entire estate had a value which put it within the class for which the rate was three per cent, that rate was to be applied to the value of the property within the State in computing the tax on its transfer, although its value separately taken would put it within the class for which the rate was two per cent. There was no attempt, as here, to compute the tax in respect of the part within the State on the value of the whole."[21]

These two cases have been set out at length so that they may be used as a basis for an examination of the nature of that sort of legislation which taxes property without the jurisdiction of a State and that which does not. Concretely, let us consider a case where there is an estate composed of tangible personalty, one-half of which is located within the taxing State. Assume that the State's death tax statute, like the one in *Maxwell v. Bugbee*,[22] imposes a tax the rate of which is determined by the entire value of the estate, wherever located, but which applies the tax rate so ascertained to only that property of the estate which is within the taxing State. Such an estate demonstrably pays more tax to the taxing State than does an estate which has all of its property located within the State, though the property of the latter estate is equal in value to that part of the former estate which is located within the taxing State.[23] How may such a difference in the tax imposed upon the transmission of the same amounts of property located within the State be justified? The matter seems to create a dilemma. The alternatives would seem to be to admit that a part of the tax is attributable to the property located outside the State or to contend that the

would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. *It would open the way for easily doing indirectly what is forbidden to be done directly* and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard other States could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each State had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect to the rates; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others." (Emphasis supplied.)

[20] 250 U. S. 525 (1919).

[21] Frick v. Pennsylvania, 268 U. S. 473, 496 (1924).

[22] 250 U. S. 525 (1919).

[23] If the State's tax rate is 10% on estates of $10,000,000 and 5% on estates of $5,000,000 and we have an estate, $5,000,000 of which is located within a State having in force the sort of statute we are here examining, the estate will pay a tax to the State of 10% of $5,000,000 or $500,000. If the entire estate were of a value of $5,000,000, all located in the taxing State, the tax would be 5% of $5,000,000 or $250,000.

State is justified in taxing that part of an estate located within its borders at a higher rate where a part of the estate is located outside of its borders than when that same amount is within its borders and constitutes the entire estate. To accept the first alternative would be tantamount to conceding that the statue was an unconstitutional violation of the due process clause of the Fourteenth Amendment.[24] To embrace the second would be no less unfortunate from the State's point of view because there may be doubt whether such a classification would be held to be a reasonable one. If the classification were found unreasonable, the statute could be struck down as violative of the equal protection clause of the Fourteenth Amendment.[25] The right to classify confers the right to treat as different for a particular purpose those things which are in fact different. *Reasonable classification* would seem to require that a factual difference, and not merely a tenuous distinction, exist between those things which are to have different treatment. In cases involving the application of State death taxes, a consideration which seems to be uppermost in the collective mind of the Supreme Court is whether the State which is seeking to impose the tax is giving anything in return for the attempted exaction.[26] Logically, then, it would seem that a State death tax rate could properly be characterized as unreasonable if its classifications were not based upon the "service" rendered by the State in according the right to inherit the property. As to property located outside the State in question, another State accords that right. Put baldly, for the State in question to base its death tax rate upon all

[24] Curry v. McCanless, 307 U. S. 357, 363 (1939); Green v. Van Buskirk, 7 Wall. 139, 150 (U. S. 1869).

[25] Colgate v. Harvey, 296 U. S. 404, 423 (1935); "The classification, in order to avoid the constitutional prohibition, must be founded upon pertinent and real differences, as distinguished from irrelevant and artificial ones." The principle was reaffirmed but Colgate v. Harvey, *supra,* was overruled in Madden v. Kentucky, 309 U. S. 803 (1940).

[26] State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942) held that shares of stock could constitutionally be subjected to a death tax by a State other than the domiciliary State of the decedent. Douglas, J., writing for the Court, said (at p. 181); "In case of shares of stock, jurisdiction to tax is not restricted to the domiciliary State. *Another State which has extended benefits or protection,* or which can demonstrate the practical fact of its power or sovereignty as respects the shares may likewise constitutionally make its exaction." (Emphasis supplied.) Further, in Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292 (1944), the Court said (at p. 295); "On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is personalty attributable to Minnesota and to no other State." And further (at p. 297); "The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the Constitutional basis for tax apportionment in these interstate commerce situtations, and it is on that basis that the tax laws have been framed and administered." See also Wisconsin v. J. C. Penny Co., 311 U. S. 435, 444 (1940) where Frankfurter, J. said: "That test [of a State's Constitutional power to tax] is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power executed by the state bears fiscal relation to protection, opportunities and benefit given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

of the property of the decedent, whether located within or without the State, places the State in the position, in a clear economic sense, of charging for a "service" which it has not rendered to such an estate, whereas it only charges an estate which is completely located within the State for that "service" which is actually rendered to it. The latter type of estate is treated differently from the former when there is no reasonable basis for such a distinction. It would seem that this creates an unreasonable classification which should be struck down.[27] It was against such a Constitutional background that the credit device was born and State "slack tax" statutes enacted to make it a part of the tax structures of the States. The rule apparently was that the *rate* of a State death tax could be increased by taking into account tangible property of the decedent located beyond the borders of the taxing State without, in contemplation of law, taxing the extra-State tangibles. Thus, such a death tax appeared not to be invalid as a deprivation of property without due process of law in violation of the Fourteenth Amendment.[28]

By way of generalization it may be said that the "slack tax" statutes were deficient in regard to the constitutional problem which we are about to consider because they left much unsaid. A reading of many of the statutes will leave one with the feeling that the enacting legislatures were blind to any danger that the statutes might result in unconstitutionally taxing tangible property outside of the State's jurisdiction.

STATE STATUTES

Before the enactment of the credit provision, there were those States which had full-blown inheritance tax laws. Perhaps Congress expected that these States would hold their inheritance tax laws as they were before the advent of the credit.[29] Such was rarely the case. Most of

[27] *But cf.* Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U. S. 412 (1937) wherein was involved a Louisiana chain store tax whose rate was determined by the total number of units in the chain, both within and without the State. The more units there were in the chain, wherever located, the higher the rate of tax on those units located in Louisiana. The validity of the statute was upheld over objections that it deprived A&P of property without due process of law, the Court saying (at p. 425): "Such classification is not *in legal effect* the taxation of property or privileges possessed or enjoyed by the taxpayer beyond the borders of the state." (Emphasis supplied.)

Perhaps a State may go further in imposing such a tax on a business than in taxing an inheritance. Such a possibility is suggested by Holmes, J., *dissenting,* in Maxwell v. Bugbee, 250 U. S. 525, 544 (1919): "New Jersey could not deny to residents in other States the right to take legacies which it granted to its own citizens, and therefore its power to prohibit all legacies cannot be invoked in aid of a principle that affects the foreign residents alone. In Kansas City, Fort Scott & Memphis Ry. v. Kansas, 240 U. S. 227, 235, the State could have refused incorporation altogether and therefore could impose the carefully limited condition that was upheld."

[28] Maxwell v. Bugbee, 250 U. S. 525 (1919).

[29] *But cf.* the remarks of Secretary of the Treasury, Andrew Mellon, before U. S. Senate Committee on Finance when asked about how much revenue was lost to the Federal Government by reason of the credit: "I do not think it would be

the States which imposed death taxes before retained them thereafter and supplemented them with an additional estate tax.[30] Some of the States which had inheritance tax laws antedating the credit retained them but did not enact any additional estate tax.[31] A few States which had inheritance taxes theretofore repealed them and enacted estate taxes in their stead.[32] All of those States, save one, which had no death taxes before, wrote into their law some form of death tax to take advantage of the credit allowed by what is now I. R. C. §813(b).[33] At present, Nevada is the only State which has no form of death tax.

a. *The Forms of the Statutes*

Most of the State statutes which have been enacted to take advantage of the credit are unique in phraseology. Therefore, to make an exact classification of them, one would have to make almost as many classes as there are statutes. For our purposes, however, these statutes may be roughly grouped into the categories which follow.

Category No. 1—These statutes impose a tax for the difference between the normal death tax of the taxing State and 80% of the basic Federal Estate Tax. If applied strictly according to its language such a statute results in the taxing State's imposing taxes which aggregate the full amount of the credit allowable.[34]

Category No. 2—These statutes impose a tax for the difference between the total of all death taxes paid to States or territories of the United States or to the District of Columbia, and 80% of the basic Federal Estate Tax. Such a statute may be so applied as to take up all or only a part of the 80% credit, depending upon the status of the law of other States in which property of an estate is located. For example, if part of a particular estate were located in a State which had no statute to take advantage of the credit, a taxing State operating under a statute belonging to this category would collect a larger tax than it would if

possible to estimate that. The states have varying rates of charge. And I know that in some of these states they are expecting to increase their inheritance tax in order to be able to get the benefit of this 80% return." *Hearings before Committee on Finance of the U. S. Senate on the Revenue Act of 1926*, p. 34.

[30] In all, thirty-seven States and Hawaii have such "additional estate tax" statutes. See 1 CCH ALL-STATE INH., ESTATE AND GIFT TAX REPORTER, Compendium.

[31] Idaho, Illinois, North Dakota, Oregon, South Dakota, Utah, and Wyoming. *Op. cit. supra*, note 30.

[32] Arizona, Arkansas, New York, and Oklahoma. *Op. cit. supra*, note 30.

[33] 1 CCH INHERITANCE, ESTATE, AND GIFT TAX REPORTER, Compendium.

[34] This type of statute is in force in the States indicated by the citations which follow. ARIZ. CODE ANN. §40-103 (1939); CAL. PROB. CODE ANN. §14441 (1944); COLO. STAT. ANN. c. 83, §1 (1935); KAN. GEN. STAT. ANN. §79-1501a (1949); KY. REV. STAT. §140.130 (1948); MICH. STAT. ANN. §205.202 (b) (1948); N. M. STAT. ANN. §34-125 (Cum. Supp. 1951); N. Y. CONSOL. LAWS, c. 60, §§249n and 249o (1932); N. C. GEN. STAT. §105-7 (1943); OKLA. STAT. ANN. tit. 68, §989b (1941); R. I. GEN. LAWS c. 43, §32 (1938); S. C. CODE ANN. §2504-1 (1942); VA. CODE ANN. §58-162 (1950); WASH. REV. STAT. ANN. §11202b (1933).

the same portion of the estate which is located outside the State were located in a State which had a statute designed to absorb some of the credit.[35]

Category No. 3—These statutes impose a tax for the entire amount of 80% of the basic Federal Estate Tax.[36]

The above Categories could be further subdivided upon the basis of those statutes which apply only to residents and those which apply to both residents and nonresidents but to do this would be fruitless for our purposes. The reason is that the constitutional difficulty considered *infra* does not turn upon that diversity in the statutes. Such differences may at most have the effect of aggravating the problem, as will be illustrated.

THE CONSTITUTIONAL DIFFICULTY RAISED

Three years after the enactment of the Credit provision the legislature of Pennsylvania enacted a statute to enable Pennsylvania to receive the benefit of that provision. Two years later the case of *In Re Knowles Estate*[37] came before the Supreme Court of Pennsylvania. Executors of and legatees under the will of a Pennsylvania decedent, all of whose property was located in Pennsylvania, sought to get an adjudication that the above-mentioned statute was unconstitutional. The Supreme Court of Pennsylvania refused to decide the constitutional question, stating that the executors and legatees had no standing to question the constitutionality of the statute. This conclusion was based upon the theory that the plaintiffs were not injured by the operation of the statute, since the same amount of tax would have to be paid to the Federal Government it the tax were not paid to Pennsylvania.[38]

[35] This type of statute is in force in the States indicated by the citations which follow. ARK. STAT. ANN. §63-103 (1947); CONN. GEN. STAT. §2065 (1949); DEL. REV. CODE §109 (1935); FLA. STAT. ANN. §198.02 (1941); HAWAII REV. LAWS §5562 (1945); IND. ANN. STAT. §6-2438 (1933); IOWA CODE §451.2 (1946); LA. STAT. ANN. §2432 (1950); ME. REV. STAT. c. 142, §35 (1944); MD. ANN. CODE GEN. LAWS art. 62A, §2 (1939); MASS. ANN. LAWS c. 65A, §2 (1945); MINN. STAT. ANN. §291.34 (West 1945); MO. REV. STAT. ANN. §574 (1939); MONT. REV. CODES ANN. §91-4411 (a) (1947); NEB. REV. STAT. §77-2101 (1943); N. H. REV. LAWS c. 88, §1 (1942); N. J. STAT. ANN. §54-38.1 (1940); OHIO GEN. CODE ANN. §§5335-1 and 5335-3 (1945); PA. STAT. ANN. tit. 72, §2303 (1949); TENN. CODE ANN. §1297 (Williams 1934); VT. STAT. REV. §1121 (1947); WIS. STAT. §72.50 (1949).

[36] ALA. CODE ANN. tit. 51, §432 (1940); GA. CODE ANN. §92-3401 (1933); MISS. CODE ANN. §9264 (1942). The Texas statute, TEX. STAT., REV. CIV. art. 7144a, §1 (1936), is unusual in that it imposes an additional estate tax for the difference between the Texas normal inheritance tax and 80% of the Federal Estate Tax paid with respect to the property located in Texas.

[37] 295 Pa. 571, 145 Atl. 797 (1929).

[38] The principle that one who would question the constitutionality of a statute must show some direct injury to himself from its enforcement is well established. In the cases of Frothingham v. Mellon and Massachusetts v. Mellon, 262 U. S. 447, 488 (1923), Justice Sutherland said: "The party who invokes the power [to disregard an unconstitutional statute] must be able to show not only that the

It was then apparent that one desiring to test the constitutional validity of a State tax designed to take advantage of the Federal Estate Tax Credit would have a difficult chore in establishing the requisite standing so to do. The later Pennsylvania case of *In Re Markle's Estate*[39] impliedly suggests a possible way to acquire such standing. Briefly stated, the suggestion was that those in charge of an estate hasten to pay the Federal Estate Tax before the States attempt to collect their death taxes.[40] Apparently the court's thought was that such a strategy would "nip in the bud" the standard argument against the requisite standing in such cases, which is that the estate is not injured because if the tax were not paid to the State under the contested statute it would have to be paid to the Federal Government. Obviously, the action suggested by the court would foreclose such a contention because, as the Federal Tax would already be paid in full, it would be contrary to fact to say that if the contested tax were not paid to the State it would have to be paid to the Federal authorities. Such a path is, however, not free from thorns. For one thing, if the estate is a large one, some of the property of the estate might have to be disposed of at sacrifice prices in order to obtain the immediate cash necessary for such a maneuver.

In *Treichler v. Wisconsin*[41] the taxpayer was able to raise the constitutionality of the Wisconsin emergency tax which was 30% of the total of Wisconsin death taxes imposed by the normal death tax and the additional estate tax of that State. The particular decedent's estate was composed of tangible personalty, 87.52% of which was located in Wisconsin and the balance was located in Illinois and Florida. In computing the emergency tax the Wisconsin authorities used 80% of the basic Federal Estate Tax as a basis. This was done upon the theory that since more than 80% of the decendent's estate was located in Wisconsin, that State could take up all of the 80% Federal credit. The estate contended that such a computation caused the Wisconsin emergency tax to fall upon that tangible property of the decedent which was located in Illinois and Florida and that the Wisconsin tax was therefore violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Wisconsin Supreme Court held

statute is invalid but that he has sustained or is in danger of sustaining some direct injury as a result of its enforcement and not merely that he suffers in some indefinite way in common with other people generally."

[39] 311 Pa. 472, 166 Atl. 884 (1933).

[40] 311 Pa. 472, 477, 166 Atl. 884, 885 (1933), the court stated: "It is also contended on behalf of the commonwealth that the executors have no standing to question the construction of the Act of 1927, *supra*, because, regardless of the construction placed on that act, the total amount of taxes payable by the estate remains the same. . . . This argument is not supported by the record. So far as it now appears, the amount of the tax due the federal government has been finally determined and paid. There is nothing in the record to indicate that, if the commonwealth does not collect this sum, the federal authorities will do so."

[41] 338 U. S. 251 (1949).

the statute valid.[42] The rationale of the decision was that if a State had 80% or more of the property of an estate within its jurisdiction, its additional estate tax could be applied to impose a tax for the amount of the entire 80% Federal Credit without violating the Federal Constitution.[43] Upon appeal, the United States Supreme Court reversed that decision and held that the Wisconsin Emergency Tax, as so computed, taxed tangible personalty having an actual situs in other States and was therefore violative of the due process clause of the Fourteenth Amendment.[44] The guiding principle of the decision seems to be found in this passage from the opinion of Mr. Justice Clark: ". . . in *Frick v. Pennsylvania,* 268 U. S. 473 (1925), Pennsylvania levied an inheritance tax based upon real and personal property wherever located. . . . In a unanimous opinion this Court ruled that Pennsylvania's statute, 'in so far as it attempts to tax the transfer of tangible personalty having an actual situs in other States, contravenes the due process of law clause of the Fourteenth Amendment and is invalid.' Wisconsin's statute may be more sophisticated than Pennsylvania's, but in terms of ultimate consequences this case and the *Frick* case are one. *It is quite unnecessary to know in either case what property is located within the taxing jurisdiction in order to compute the challenged exaction.*"[45]

Thus, it appears that where an estate is composed of tangible property located in more than one State, a State must be careful, in applying its additional estate tax, to take up only that proportion of the 80% Federal Credit which that property included in the Federal gross estate and located within the State bears to all of the property, wherever located, which was included in the Federal gross estate.[46] The Court gives some indication that such apportionment would render the statute valid.[47]

[42] Estate of Miller, 254 Wis. 24, 35 N. W. 2d 404 (1948).

[43] *Id.* at 29, the Wisconsin Court said: "It would seem patent that in imposing the emergency tax, as in imposing the normal tax, care must be used to avoid taxing property beyond the jurisdiction of the state. However, we need make no further effort in pursuit of such speculation. We are met with no such situation here, *since 86% of the property belonging to the Miller estate was located in Wisconsin and the emergency tax imposed under the state's computation is upon something less than 80% of the total federal taxes.*" (Emphasis supplied.)

[44] Treichler v. Wisconsin, 338 U. S. 251 (1949).

[45] *Id.* at 256. (Emphasis supplied.)

[46] *Id.* at 254: "The court below thought that the presence of 87.52% of Mr. Miller's property within Wisconsin justified its statement that the state taxed only Wisconsin property. And the state argues that the 'other 20%' over the federal basic estate tax 80% credit 'more than absorbs, or is, on any mathmatical basis, attributable to' the 12.48% of property outside Wisconsin. But Wisconsin made but 80% of the federal tax its own; and as it did not apportion that 80% to property within the state, the presence of property therein is simply a fortuity which cannot help the taxing jurisdiction."

[47] "A different question might be presented, however, if the statute in question authorized computation to begin with 87.52% rather than all of the 80% federal credit. We intend to intimate no opinion as to that situation." *Id.* at 255, footnote 3.

It is interesting to consider the effect of the *Treichler* case upon *Maxwell v. Bugbee.* The United States Supreme Court stated in the *Treichler* case: "We think it clear that the order entered by the Supreme Court of Wisconsin authorized a tax on property *rated and measured* in part by tangible property, the situs of which was outside Wisconsin. This Wisconsin may not do."[48] The basis of the decision in *Maxwell v. Bugbee,* upholding the validity of the New Jersey statute, was that only the *rate* of the tax was affected by the tangible property located outside New Jersey.[49] Hence, there is language in the *Treichler* case which, if taken literally, might overrule *Maxwell v. Bugbee.* Perhaps this was inadvertent dictum since the rate of the tax in the *Treichler* case was fixed at 30%, regardless of the amount of property within or without Wisconsin. This hypothesis is supported by the interpretation which the Supreme Court in the *Treichler* case put upon that case, saying that it and the *Frick* case[50] were alike.[51] Thus interpreted, the *Treichler* case does not thrust far enough to taint the authority of *Maxwell v. Bugbee.* No new constitutional doctrine has been evoked but the old has been reaffirmed and a new "rule of thumb" supplied for its application.[52]

The holding of the *Treichler* case, then, seems to indicate that the method for computing the additional estate tax provided for in the Wisconsin statute[53] is violative of the due process clause of the Fourteenth Amendment. That method is to take the amount of the 80% Federal Credit and subtract from it all death taxes paid to any State or territory or the District of Columbia in respect to any property included in the estate of the decedent. The remainder is the Wisconsin additional

[48] *Id.* at 256. (Emphasis supplied.)

[49] See note 14 *supra* and text pertinent thereto.

[50] Frick v. Pennsylvania, 268 U. S. 473 (1925).

[51] Treichler v. Wisconsin, 338 U. S. 251, 256 (1949): "Wisconsin's statute may be more sophisticated than Pennsylvania's, but in terms of ultimate consequences this case and the *Frick* case are one."

[52] *Ibid.,* at 256. The Court said, referring to Frick v. Pennsylvania, 268 U. S. 473 (1925): ". . . in terms of ultimate consequences this case and the *Frick* case are one. *It is quite unnecessary to know in either case what property is located within the taxing jurisdiction in order to compute the challenged exaction.*" The emphasized matter is what is referred to in the text as the new "rule of thumb."

Additional support for the conclusion that the authority of *Maxwell v. Bugbee* remains unimpaired is found in reconsidering what *Maxwell v. Bugbee* and *Frick v. Pennsylvania, supra,* held. The former held that extra-State tangible property could be allowed to affect the *rate* of a death tax without offending the Constitution, whereas the latter held that such property could not, consistently with due process, be used to increase the amount of property to which the death tax rate would be applied. It would seem that if the forbidden procedure of including extra-State tangible property in the fund subject to a death tax were adopted in a statute, the evil of such a provision would not be purged by adding to the statute the innocuous provision that the rate of the tax should be affected by extra-State tangibles. The statement of the Court in the *Treichler* case that Wisconsin could not legally impose a death tax *rated and measured* by extra-State tangibles is perfectly consistent with *Maxwell v. Bugbee* and *Frick v. Pa., supra.*

[53] WIS. STATS. §72.50 (1931).

estate tax. Such a holding would have far reaching consequences, since this type of statute is in effect in twenty-one States and Hawaii.[54] Another factor is that the unconstitutionality of those statutes in Categories 1 and 3 would seem to follow *a fortiori* from such a result.[55] This conclusion is based upon the reasoning that if some semblance of an effort to apportion the credit (as may be seen in the wording of those statutes in Category No. 2) does not relieve an additional estate tax statute from the stamp of unconstitutionality, *a fortiori* a statute which makes no attempt to apportion the credit among the various States involved (which is the position of those statutes in Categories 1 and 3) would be unconstitutional.

If the above reasoning is sound, *Treichler v. Wisconsin,* has, by applying established constitutional law to new circumstances, marked out a new substantive constitutional right for a person residing in States having additional estate tax statutes belonging in Categories 1, 2 and 3.[56] That right is the right to have each State in which tangible property of an estate is located, take up by way of a tax designed to take advantage of the Federal Credit only that proportion of the 80% Credit which the property included in the estate and located in the State bears to all the property included in the estate, wherever located. Such a right should be enforcible but, as we have seen, the taxpayer can rarely establish the requisite standing in court to question the constitutionality of a statute designed to give a State the benefit of the Federal Estate Tax Credit.[57] Administrative redress is no more effective. It seems that the Commissioner cannot, by the use of regulations, prorate the credit among the various States involved. For example, the Commissioner promulgated a regulation requiring that: ". . . Before the Commissioner allows any credit for any estate, inheritance, legacy, or succession taxes, there must be submitted to him a complete list of the property in respect to which any such taxes were imposed, and the amount thereof paid, certified under the hand and official seal of the officer of the taxing State or territory having custody of the records pertaining to such taxes."[58] In *Morsman v. Commissioner,*[59] it was held that even though the taxpayer had not complied with this Regulation he could still get the benefit of the credit upon showing that he had paid State death tax in respect to property included in the Federal gross estate. Reasoned the Board of Tax Appeals: "We are of the opinion that §301(b) is a part of the provision for computing the tax

[54] See note 35 *supra* and applicable text.
[55] See notes 34 and 36 *supra* and applicable text.
[56] See notes 34, 35 and 36 *supra.*
[57] In Re Knowles Estate, 295 Pa. 571, 145 Atl. 797 (1929); *cf.* Frothingham v. Mellon and Massachusetts v. Mellon, 262 U. S. 447, 488 (1923).
[58] Reg. 68, Art. 9(a), under §301(b) of the Revenue Act of 1924.
[59] 13 B. T. A. 415 (1928).

due and not, as contended by the respondent, a method of satisfying the tax liability found. . . . The issue before the Board is . . . whether petitioner has paid any estate, inheritance, legacy or succession taxes to any State or territory in respect to any property included in the gross estate."[60] Thus, the taxpayer was able to get the credit allowed even though he ignored the Commissioner's regulation.[61] Later, *Estate of Pamphila H. Phillips*[62] held that the Commissioner must allow credit for a portion of State death taxes which allegedly were illegally paid unless he can show that such payments have been refunded. Putting these cases together, it appears that once death tax has been paid to a State, the Commissioner must allow credit therefor up to 80% of the basic Federal Estate Tax, whether his regulations in regard thereto have been complied with or not and even though part of the tax paid to the State may have been illegally exacted. It should be mentioned that the illegality of the tax involved in *Estate of Pamphila H. Phillips* was that it contravened the statutory law of Pennsylvania. Perhaps the decision in that case would have been different if the illegality had been an alleged violation of the Constitution of the United States. There is, however, nothing in the decision to indicate that such would have been the case. This condition of the law leads us to examine curative measures.

SOME SUGGESTED SOLUTIONS

It has just been indicated that proration of the credit among the States (on the basis of that percentage of Federal gross estate property located in each) cannot be done by the Commissioner. Merely because *Treichler v. Wisconsin* has rendered of doubtful constitutionality the three basic methods of computing the additional estate tax to take advantage of the Federal Credit, which are embodied in most State statutes enacted for that purpose, does not remove the difficulty. State statutes will probably not be amended to change the method of computation to a constitutional one. In the case where a taxpayer can establish a standing to question the validity of one of these statutes, it will be declared unconstitutional.[63] Such a case will, however, rarely arise

[60] *Id.* at 417. [61] Morsman v. Commissioner, 14 B. T. A. 109 (1928).
[62] 36 B. T. A. 1102 (1937).
[63] The *Treichler* case, on remand to the Supreme Court of Wisconsin, is instructive in this regard. Executor Treichler moved for judgment. The Supreme Court of Wisconsin stated that it had intended to so construe the statute as to make it apply only to property having a taxable *situs* within Wisconsin. So, it reconstrued the statute and entered judgment against the estate for the amount of the tax due, as determined by a new computation made in accordance with the decision of the Supreme Court of the United States. Said the Court: "Neither misapplication of a law, nor the fact that it can be misapplied, renders it unconstitutional." 5 CCH STATE INH., ESTATE AND GIFT TAX REPORTER, ¶17,214 (1950). Upon appeal from this revised computation the United States Supreme Court, on November 6, 1950, in a per curiam opinion, affirmed this revised computation. 4 CCH STATE INH. ESTATE AND GIFT TAX REPORTER, ¶1,340 (1950).

since it seems clear that, absent some tax similar to the Wisconsin Emergency Tax, which is in addition to the additional estate tax and computed thereon, no taxpayer will have the requisite standing to question the validity of these statutes.[64] Those who are injured will be literally voices "crying in the wilderness." Meanwhile, many States will continue to exact taxes, under their statutes designed to take advantage of the Federal Credit, in a manner which is incompatible with the Constitution of the United States. Some States will get more than their legal share of the taxes from an estate, with the result that either the tax inequality among the States will be increased or estates will be mulcted with taxes through the operation of the credit device, a mechanism which was designed to allow the States to get a part of the death taxes which ordinarily would go to the Federal Government *without increased cost to the estates involved.* The occurrence of either alternative would be a perversion of the credit concept.

Clearly, something should be done to correct such a state of affairs. Any corrective, to get the desired uniformity among the States, should be applied at the Federal level. Some solutions which might be utilized will be now examined.

1. A possible solution would be to amend section 813(b) to provide that Federal estate taxes shall be paid before State death taxes and that there then could be refunds of up to 80% of the Federal estate tax paid for death taxes paid to States under constitutional State statutes. This would have the effect of always giving the taxpayer a standing to question the constitutionality of a State statute designed to take advantage of the credit. Since the tax would have already been paid to the Federal Government it could not be said that the taxpayer would not be injured if the statute were unconstitutional, on the theory that if he did not pay the tax to the State he would have to pay it to the Federal Government. Such a contention would, if this amendment were adopted, be manifestly untrue because the Federal tax would have been paid and if the unconstitutional State tax were paid the taxpayer would be injured by the operation of the unconstitutional State statute and would have standing to question its validity.

Objections to this alteration are that the taxpayer might have to pay both Federal and State taxes allegedly due which could necessitate a sacrifice of a portion of the estate. This change also has much of the makeshift in it, for it would encourage litigation to settle a matter which could be best worked out by Congress' specifically spelling out a basis upon which it may be determined how much of the Federal Estate Tax a given State may receive. Once the Congressional pen is taken up it should not be laid down until it has been used to the best possible ad-

[64] *In re* Knowles Estate, 295 Pa. 571, 145 Atl. 797 (1929).

vantage. Nevertheless, this course would preserve the present character of the credit concept more than would the one suggested in Number 3 and would be rather effective to assure proper apportionment of the credit among the States concerned.

2. Another possible solution would be to allow a graduated credit. That is, the percentage of the credit could be made to vary inversely with the size of the estate, so that the percentage of credit allowable would be smaller on a large than on a small estate, and vice versa.[65] It would seem that such an approach would be equitable. The rationale would be that the larger the estate, the more likely that many have contributed to its accumulation. Therefore, the credit against the Federal Estate Tax should be smaller so that more of the tax would go to the Federal Government. In this way most of the tax would be spent for the benefit of all the States in providing governmental service at the Federal level. Admittedly, this would not give absolute equality in the benefits derived from the taxes but it would not aggravate the woodenness of the credit device as now employed. Such a change would, in many cases, minimize the significance of domicile in the distribution of the credit. This would be in line with the present attitude of the Supreme Court requiring taxation of tangibles at their actual situs and allowing multi-State taxation of intangibles.[66]

While a rather exact determination of the portion of Federal Estate Taxes to be distributed among the States could be made by use of this plan, it might be desirable for Congress to enact a statute providing that that portion of the Federal Estate Tax which is distributed among the States should be distributed according to population. This might be more desirable economically since, in theory, a distribution of the tax on the basis of the location of property constituting the estate could tend to increase the inequality among the States by giving the bulk of the tax, in the long run, to those States having the most property within their borders. This might not be a happy solution. Therefore, in the

[65] Such a method was advanced by Congressman Ramseyer in debate on the Revenue Revision of 1925. He said: "Take Henry Ford for instance. The whole United States has contributed, and contributes daily, to his fortune. If he should die, say worth $500,000,000, under the proposed bill before us, speaking in round numbers his estate would pay an estate tax of $100,000,000. With an 80% credit Michigan would get $80,000,000 and the federal government $20,000,000. Now the people of Michigan have not contributed to that fortune any more than the number of their population bears to the population of the entire United States. In that case, in fairness to all concerned, the credit should be reversed. I have thought of a three-bracket arrangement. That is to say, a bracket up to $500,000 given the state a credit of 75 per cent; then a bracket from $500,000 to $2,000,000 or $3,000,000, given a credit to the state of 50 per cent; and another bracket for that portion of the estate over $3,000,000, giving the state a credit of 25 per cent." 67 Cong. Rec. 708, 965 (1925).

[66] Treichler v. Wisconsin, 338 U. S. 251 (1949) (tangible); State Tax Commission of Utah v. Aldrich, 316 U. S. 174 (1942) (intangible).

absence of evidence to the contrary, it would seem wiser to adhere to distribution on the basis of property location.

At any rate, this solution does not appear adequate to the writer for the reason that it would not prevent some States from getting more than their share of the credit, whatever the amount of the credit turned out to be.

3. The third solution is to amend §813(b) to provide that the Federal Government shall collect its basic estate tax upon a particular estate and shall thereafter distribute 80% thereof among those States which have constitutional taxing jurisdiction over property included in the Federal gross estate. Any State which has a death tax applicable to a particular estate will get no part of the Federal distribution of estate tax collected in regard to that estate and must be content with its own death tax in regard to that estate. This change would draw the criticism that it authorizes the sharing of Federal Estate Taxes with the States and is therefore tantamount to an admission that the Federal Government should not levy an estate tax in the first place. However, this seems to the writer the best solution and the draft of a statute to implement this plan follows.

SUGGESTED STATUTE TO REPLACE I. R. C. §813(b)

Sec. 813(a) ((Unchanged)).

(b) (1) Upon receipt of payment of the tax imposed by section 810 or section 860, known as the basic estate tax, 80 per centum thereof shall be distributed by the Commissioner of Internal Revenue among those States, Territories of the United States or the District of Columbia which have constitutional taxing jurisdiction over any of the property of the particular estate included in the Federal gross estate. The amount which each such State shall receive shall be that proportion of 80 per centum of the basic estate tax which the value of the property of the estate within the constitutional taxing jurisdiction of that State bears to the total value of the property of the estate within the constitutional taxing jurisdiction of all States. For purposes of this section, the valuation placed upon property of an estate for the purpose of computing the Federal Estate Tax shall be conclusive.

(2) The Commissioner shall compute the share of each such State in the following manner: He shall determine the valuation of all of the property of the estate which is within the constitutional taxing jurisdiction of each State. After doing this as to the property within the constitutional taxing jurisdiction of each State, he shall total these valuations. He shall then determine the ratio which the valuation of all of the property of the estate within the constitutional taxing jurisdiction of each State concerned bears to such total of valuations. This ratio shall be, in the case of each State, the percentage of 80 per centum of the basic estate tax on the particular estate which shall go to that State.

(3) The correctness of the Commissioner's determination of that proportion of 80 per centum of the basic estate tax to which each State is entitled may be reviewed by the Tax Court but it shall not be reviewed or redetermined by any other court or agency.

(4) No State which has in force a death tax statute applicable to an estate shall be entitled to receive any of the Federal Estate Tax collected on that estate and distributed by the Federal Government to the States. *Provided,* nothing herein contained shall be construed as entitling any State to receive more than its distributive share of Federal Estate Taxes as computed under subparagraph (2) of this subsection.

Conclusion

We have seen the spectacle of inadequately guided State statutes, whose enactments were actuated by a Federal statute, frustrating the aim of the Federal statute and creating a favorable climate for unconstitutional developments. Some possible solutions have been inspected. It seems to the writer that the suggestion of retaining the credit device but amending the statute embodying it pursuant to Suggestion 3, *supra,* is the best considered. In its favor may be urged the exactitude of distribution implicit in such a method of sharing Federal Estate Taxes with the States. Furthermore, it is doubtful whether such a plan could be attacked on constitutional grounds even if the Court disregarded subsection (b)(3) of the proposed amendment to §813, since it would be difficult to acquire standing to so attack it.[67] Even if such standing were acquired it would seem clear that a statute of this type would now be held constitutional.[68] This plan would destroy the efficacy of a scheme sometimes used by States to get more than their share of the credit. Since the credit is based upon the Federal valuation, the scheme is to place a high valuation on the property of the decedent located within the State, thereby seemingly entitling the State to a larger share of the credit. While some States have precluded this by adoption of the Federal valuation, most States adopt their own valuation.[69]

To this solution it may be objected: A sovereign government is impossible without the power of taxation. Witness the United Nations. Thus, if the States of the United States are to remain sovereign they must keep their power of taxation intact. Since the relinquishment of

[67] Frothingham v. Mellon and Massachusetts v. Mellon, 262 U. S. 447 (1923); Florida v. Mellon, 273 U. S. 12 (1927).

[68] Steward Machine Co. v. Davis, 301 U. S. 548 (1937). In Helvering v. Davis, 301 U. S. 619, 640 (1937) the Court held that the benefits created by the Social Security Act of 1935 did not violate the limitations of the Tenth Amendment, stating: "Congress may spend money in aid of the 'general welfare.'" It is interesting to speculate whether the credit device would have been resorted to at all if Congress had had these decisions to consider when the Revenue Act of 1924 was before it.

[69] CCH ALL-STATE INH., ESTATE AND GIFT TAX REPORTER, ¶1800E (7th ed., 1944).

this power upon the inducement of the Federal Government might start a reduction of respect for the integrity of this State power, it seems unwise to adopt such a statute so long as it is desired to retain a federalism in which the States are dynamic entities, rather than mere administrative subdivisions. To this objection it may be answered that such relinquishment of the power to impose this specific tax could be withdrawn by the people of any State at any time through action of the State legislature in reenacting the State's death tax. Such action would, of course, be completely *ex parte.* Furthermore, State legislators are not likely to make a poor trade in this regard, since self-interest will normally forestall any evacuation by them of the death tax field unless they were shown that the revenues of their State would be increased thereby. Under this proposed plan a State may choose either to levy a death tax, and thereby forego the benefit of receiving its portion of the Federal Estate Tax under the proposed statute, or it may repeal its death tax statute, and thereby elect to take such death taxes as may be rebated to it under the plan. It would have to do one or the other. *Tertium non datur.* The State could, however, follow the one so long as it deems that such course is most advantageous to it, then change to the other at any time, with or without reason. It may say, as did Shylock, "It is my humor."

Administrative factors favor having the death tax levied by the Federal Government. It may be said that much evasion and expense of collection would be saved thereby.[70] It has even been proposed that there be assigned to the Federal Government "all those types of taxes in the administration of which it possesses a substantial advantage as compared with the states, with provision for such a division of the yield with the states as is appropriate to the functions assigned to them on the basis of the principle of efficiency—this is the arrangement which, in my opinion, promises to yield highest returns at least cost."[71] Clearly, the plan suggested here does not go so far. The suggested statute would not be a radical departure from the credit concept. Looked at in one way it would remove the taxpayer from the contest over the division of death taxes between the Federal Government and the States, a matter which is beyond his interest anyway. The taxpayer could (if States having taxing jurisdiction over the property of his decedent conformed to the proposed plan) pay the Federal Estate Tax and go his merry way. Then the provisions of the plan relating to distribution would come into play and this would be worked out between the Federal Government and the States, the parties whose interests are actually at

[70] Haig, *Federal Tax Collection with Allocation of Share of Proceeds to the States,* 11 TAX MAGAZINE 95 (1933).

[71] *See* Elwell, *Proposed Surrender of State Taxing Power,* 11 TAX MAGAZINE 176 (1933), which adversely criticizes this position.

stake. The basic result of the operation of the credit device, whereby is rebated to the States a part of federally collected death taxes would remain. At least one writer, a man who had argued before the Ways and Means Committee that the credit principle was an unconstitutional interference with the sovereignty of the States, has concluded that the credit has not had the effect of subordinating the States to the Federal Government, and has recommended its extension to other taxes.[72] It may well be that we are paying more than is necessary for our Federal system if we retain the comparative inaccuracy of the present method of distributing Federal Estate Taxes among the States merely because of a supposed danger to the taxing power of the States, when it is highly speculative whether such danger in fact exists.

[72] Edmonds, *Extension of Rebate of Federal Taxes to the States,* 11 TAX MAGAZINE 92, 93 (1933).